

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Communications Assistance for Law)	ET Docket No. 04-295
Enforcement Act and Broadband Access)	
and Services)	
)	RM-10865
)	
)	

**UNITED STATES TELECOM ASSOCIATION
REPLY TO OPPOSITIONS TO
PETITION FOR RECONSIDERATION AND CLARIFICATION**

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SUMMARY

The CALEA Applicability Order does not answer key questions regarding the CALEA capability requirements for broadband Internet access providers and VoIP providers under section 103(a) of CALEA. Therefore, USTelecom petitioned the Commission to delay the start of the 18-month CALEA compliance clock until the Commission provides meaningful direction regarding CALEA capabilities as promised. USTelecom also asked the Commission to clarify which specific broadband access services qualify as “newly covered” under the CALEA Applicability Order and argues that, at a minimum, the Commission should confirm that DSL services are entitled to the same 18 months for compliance as “newly covered services.”

The majority of those filing supported the USTelecom Petition. Only DOJ and VeriSign objected—on what USTelecom considers fallacious grounds. DOJ maintains that the Commission’s announcement that CALEA is applicable to broadband and VoIP providers is sufficient guidance for industry. VeriSign argues that manufacturers and trusted third parties can provide solutions. Neither of their oppositions is valid for three main reasons. First, broadband and VoIP providers must have answers regarding the scope of their CALEA capability requirements before they can implement those requirements. Second, standards-based vendor solutions are not widely available. Third, trusted third party solutions have not been endorsed by DOJ or the Commission, and trusted third parties are not accountable for CALEA violations. For these reasons, USTelecom reaffirms its request for reconsideration.

DOJ states that it has no objection to allowing all forms of DSL services, including those offered on a common carrier basis, the same 18-month compliance period as other broadband Internet access services. Given DOJ’s support and the lack of objection from any other party, USTelecom asks the Commission to confirm that all DSL services have the same 18 months to comply with CALEA as “newly covered” services.

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INTRODUCTION

On November 14, 2005, the United States Telecom Association¹ (USTelecom) petitioned² the Federal Communications Commission (Commission) to reconsider its decision to start the 18-month CALEA compliance clock for broadband and VoIP providers on November 14, 2005,³ and instead require compliance 18 months from the effective date of the Commission's forthcoming order on CALEA capability requirements. USTelecom also asked the Commission to clarify which broadband access services qualify as "newly covered services" under the CALEA Applicability Order. Seven out of the nine parties commenting

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

² *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295 and RM-10865, USTelecom Petition for Reconsideration and Clarification (Nov. 14, 2005) (USTelecom Petition).

³ *See Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295 and RM-10865, First Report and Order and Further Notice of Proposed Rulemaking (rel. Sept. 23, 2005) (CALEA Applicability Order).

wholeheartedly support the USTelecom Petition.⁴ Only the Department of Justice (DOJ) and VeriSign, Inc. (VeriSign) oppose it. DOJ implies erroneously that USTelecom is requesting that broadband and VoIP providers be exempt from CALEA compliance indefinitely, and VeriSign maintains that manufacturers and trusted third parties can provide adequate solutions.

While the CALEA Applicability Order addresses the legal question of whether CALEA applies to broadband and VoIP providers, it does not answer critical questions regarding how the Commission intends broadband Internet access providers and VoIP providers to meet the capability requirements of section 103(a) of CALEA. Specifically, this Commission has not yet addressed what capabilities industry should standardize. In addition to guidance regarding the specific assistance capabilities required of providers, the Commission has not provided guidance regarding (1) compliance extensions and exemptions, (2) cost recovery, (3) identification of future services and entities subject to CALEA, and (4) enforcement. Until the Commission answers these questions, broadband access and VoIP providers will lack meaningful direction as to what their CALEA capabilities are and, therefore, should not be required to comply with CALEA.

In light of the strong support for the USTelecom Petition, USTelecom reaffirms its request for reconsideration and asks the Commission to start the compliance clock for broadband and voice over Internet protocol (VoIP) providers on the effective date of its forthcoming order. In addition, those commenting on the USTelecom Petition agree that the Commission should

⁴ Supporters include the American Civil Liberties Union (ACLU), the Satellite Industry Association (SIA), CTIA—The Wireless Association, the Telecommunications Industry Association (TIA), Global Crossing North America, Inc., the National Telecommunications Cooperative Association, and the Organization for the Promotion and Advancement of Small Telecommunications Companies.

clarify which specific broadband access services qualify as “newly covered” under the CALEA Applicability Order. At a minimum, the Commission should confirm that digital subscriber line (DSL) services are entitled to the same period of time to comply as “newly covered services.” DOJ itself specifically endorses this relief.

DISCUSSION

I. BROADBAND AND VOIP PROVIDERS MUST HAVE ANSWERS REGARDING THE SCOPE OF THEIR CALEA CAPABILITY REQUIREMENTS.

DOJ’s opposition to USTelecom’s request for direction from the Commission is so adamant one might think that USTelecom had asked to be excused from CALEA compliance altogether.⁵ To be absolutely clear, USTelecom is not asking for relief from the obligations of section 103(a). USTelecom is well aware, that, as DOJ states, “CALEA places the *initial* [emphasis added] responsibility for deciding how the assistance-capability requirements in Section 103(a) are to be implemented on industry, through the standard-setting process.”⁶ Indeed, as DOJ itself acknowledges, the industry has been engaged in the standards-setting process for quite some time.⁷ To assist standards bodies in reaching a conclusion more rapidly, the Commission must answer pertinent questions regarding the scope of broadband Internet access providers’ obligations under section 103(a) of CALEA. As SIA notes, “there is still a substantial amount of work to be done—and a number of critical infrastructure questions to be answered—before service providers can fully implement the Commission’s CALEA directives,

⁵ See DOJ Opposition at 4, stating, “USTA’s speculation that particular providers may need additional time is no justification for a wholesale suspension of the compliance deadline for all providers, including those who can readily bring themselves into compliance by the Commission’s deadline.”

⁶ *Id.* at 3.

⁷ DOJ Opposition at 7-8.

which themselves remain a work in progress.”⁸ TIA similarly points out that the CALEA Applicability Order “does not include necessary meaningful information regarding *what* capabilities industry should standardize.”⁹

USTelecom and its member companies have raised many questions about what obligations broadband providers may have under section 103(a) of CALEA. For example, it is not always readily apparent where call-identifying information is available in the network, nor is it readily apparent whether the obligation to provide call-identifying information should fall on the VoIP provider, the broadband provider, or both.¹⁰ The meaning assigned to the term “call-identifying information” is critical to determining not only the extent of a telecommunications carrier’s duty under section 103, but also the breadth of law enforcement’s electronic surveillance authority. Indeed, in response to the Commission’s original Notice of Proposed Rulemaking,¹¹ AT&T Corp. (AT&T, formerly SBC Communications) has noted that while appropriate for circuit-switched networks, the current CALEA definition of call-identifying information is not applicable to packets in broadband Internet access and telephony.¹² According to AT&T, the Commission itself recognizes that “geographic concepts of origination and

⁸ SIA Comments at 2.

⁹ TIA Comments at 4.

¹⁰ USTelecom Petition at 2.

¹¹ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket 04-295, RM-10865, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd. 15676 (2004) (NPRM).

¹² AT&T NPRM Comments (Nov. 8, 2004) at 14.

termination may not be applicable in an IP environment because IP-based services are routed to IP devices not particular geographic locations.”¹³

In addition, AT&T has noted significant technical difficulties regarding call-identifying information that must be resolved. First, unlike circuit-switched services on the Public Switched Telephone Network, packets transmitted in typical broadband Internet access service do not run in a single direction or together in a single stream, allowing for easy interception.¹⁴ Second, broadband providers cannot distinguish among voice packets, data packets, and video packets without information from the user or content provider, which renders identifying the right packets for interception extremely difficult and protecting users’ privacy almost impossible.¹⁵ Third, broadband access service is not always provided to the end user by a single provider. A broadband customer, for instance, may obtain transport from one provider, such as DSL service from a LEC, while obtaining Internet access from a separate provider, such as an independent ISP. In such cases, it is impossible for the broadband transmission provider to perform certain CALEA functions. These distinctions must be acknowledged by the Commission as well as law enforcement.

VoIP presents a unique set of questions on which the Commission needs to provide guidance. For example, although wireline VoIP standards are final,¹⁶ providing surveillance capabilities for a single call may require extensive coordination among different providers that support a single end-user’s service—when, for instance, the end-user has one provider for its

¹³ *Id.* at 14, citing *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004).

¹⁴ *Id.* at 12.

¹⁵ *Id.*

¹⁶ The wireline VoIP standard is scheduled for publication in February 2006.

VoIP service and a different provider for Internet access, which, as discussed above, might be provided by two or more unaffiliated entities.

Another question the Commission must answer is which communications are deemed to be within a carrier's control. Many carriers may not have the ability to interpret information above the level at which they provide wholesale broadband access service, which means that law enforcement must determine who the wholesale customer is and go to that customer to interpret information above the wholesale level. BellSouth, for example, provides DSL on a wholesale basis to various Internet service providers that in turn may offer VoIP services or Internet access via passwords to their respective end users. From BellSouth's perspective as the underlying broadband transport service provider, access to information similar to the call-identifying information for circuit-based communications is limited. BellSouth notes, "most of the detail that law enforcement desires resides in the content carried over the transport and is not reasonably available to the transport provider."¹⁷

Notwithstanding its current opposition to USTelecom's petition, even DOJ itself has recognized the need for clarification of the scope of CALEA obligations. In comments filed in 2004, DOJ identifies nine areas to be resolved—such as defining call-identifying information, assessing the sufficiency of packet mode standards, and determining the feasibility of using trusted third parties—and notes that each one of these nine issues is complex and controversial enough to warrant its own rulemaking.¹⁸ DOJ cites the Commission's own finding that "significant technical and privacy concerns" must be addressed when collecting call identifying

¹⁷ BellSouth NPRM Comments (Nov. 8, 2004).

¹⁸ DOJ NPRM Comments (Nov. 8, 2004) at 41.

information in packet mode services.¹⁹ In its 2004 Petition for Rulemaking, DOJ states, “the packet mode standards that have been published are deficient.”²⁰ Now, it seems, DOJ is reversing its opinion on the suitability of packet mode standards and asserting that broadband access and VoIP providers should comply with CALEA even though their obligations are, by DOJ’s own admission, insufficiently defined.

II. STANDARDS-BASED VENDOR SOLUTIONS ARE NOT YET WIDELY AVAILABLE.

VeriSign maintains that manufacturers have developed and can offer CALEA solutions,²¹ and DOJ similarly suggests that companies can rely on vendor solutions for compliance. But this is not the case because the Commission has not yet addressed how compliance is to be achieved and, therefore, some industry standards are still under development. As TIA notes, vendor solutions are not widely available because the CALEA Applicability Order addressed only the general applicability of CALEA and “lacked any meaningful specificity on what capability requirements are applicable or which party is responsible for each.”²² Commission guidance is needed further facilitate the standards-setting process forward because industry standards and safe harbors are necessary for compliance. As Verizon notes, “While the absence of industry standards does not excuse carriers’ obligations to comply with CALEA, the reality is that most

¹⁹ *Id.*

²⁰ *United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Agency Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act*, RM-10865 (March 10, 2004).

²¹ *See, e.g.*, VeriSign Comments at 2, stating, “there is no broadband or VoIP provider who cannot become fully compliant today—much less by 17 May 2007—with the simple implementation of readily available products”

²² TIA Comments at 3.

carriers, including Verizon, employ open standards across vendors and providers, and most manufacturers build to a single industry standard, not variations for each carrier. This approach reduces manufacturers' and carriers' development costs and law enforcement's collection equipment costs."²³ CALEA requires standards-based solutions for safe harbor compliance. Therefore, even if non-standard vendor solutions are available, it would be an unacceptable risk for a provider to invest in these solutions at this time, simply to try to meet a deadline, because the providers risk being deemed non-compliant.

III. THE COMMISSION HAS NOT ENDORSED THE USE OF TRUSTED THIRD PARTIES.

VeriSign states that the 18-month compliance clock should begin immediately because trusted third-party²⁴ solutions are available to both broadband and VoIP providers. But as VeriSign should be aware, this Commission has not to date endorsed the use of trusted third parties.²⁵ The Commission has only questioned the feasibility of using a trusted third party approach²⁶ and whether an external system would be an efficient method to extract information from packets.²⁷ The Commission certainly has not explained how a provider who elects to use a trusted third party could satisfy its CALEA obligations to safeguard the privacy and security of content and call-identifying information or its CALEA obligations to protect information about

²³ Verizon NPRM Comments at 17.

²⁴ See NPRM ¶ 69. The Commission defines a trusted third party as a service bureau with a system that has access to a carrier's network and remotely manages the intercept process for the carrier.

²⁵ See USTelecom Petition at 3.

²⁶ NPRM ¶ 72.

²⁷ *Id.*

government's surveillance activities.²⁸ Even DOJ has commented that it neither endorses nor trusts third parties and has cautioned the Commission against doing so.²⁹ It has said, "the Commission should be reluctant to shift CALEA responsibilities to entities such as [trusted third parties] that are not subject to statute and therefore not accountable for statutory violations."³⁰

Of course, VeriSign has strong incentives to make it appear as though service bureaus have been able to rely on detailed standards to implement CALEA capabilities for broadband and VoIP providers³¹ because VeriSign provides "turnkey services for [lawful interception] in compliance with CALEA."³² But in fact, CALEA standards for broadband do not yet exist. Therefore VeriSign's solution cannot be "in compliance with CALEA." VeriSign implies that the Federal Bureau of Investigation's (FBI) statement of "electronic surveillance needs," which grouped together cable modem providers, DSL providers, and others as "Public Internet Protocol Network Access Services," was detailed enough to enable manufacturers to craft solutions and service providers to subsequently deploy solutions.³³ It was not. The needs discussed by the FBI are not capability requirements under CALEA, and providers deploying solutions based solely on these requirements would be deploying solutions that do not provide safe harbor. It would, therefore, be risky for a company to deploy the VeriSign solution for DSL because it does not provide a standards-based solution and therefore does not provide safe harbor under CALEA.

²⁸ See USTelecom Petition at 3.

²⁹ See DOJ NPRM Reply Comments (Dec. 21, 2004) at 27-35.

³⁰ *Id.* at 29.

³¹ See VeriSign Opposition at 7, stating, "multiple standards have been produced to meet the capability requirements—which in turn have resulted in equipment being produced, capabilities tested, and services offered."

³² See VeriSign Web site at <http://www.verisign.com/verisign-business-solutions/regulatory-compliance-solutions/calea/index.html>.

³³ See VeriSign Opposition at 6.

Therefore, VeriSign's comments should be viewed solely as a self-interested pleading by a party interested in becoming a sole-source provider. Indeed, as USTelecom and others have cautioned previously, even if the use of trusted third party solutions ultimately is approved by the Commission, such solutions may not be cost-effective for many service providers. The Commission should be mindful of this and should avoid the position of driving business toward a single company.

For the reasons stated in sections I-III above, USTelecom affirms its request for reconsideration and asks the Commission to start the compliance clock for broadband and VoIP providers on the effective date of its forthcoming order.

IV. THE PARTIES AGREE THAT THE COMMISSION SHOULD CLARIFY WHICH BROADBAND SERVICES QUALIFY AS "NEWLY COVERED" SERVICES AND THAT, IN ANY EVENT, ALL DSL SERVICES SHOULD BE AFFORDED THE SAME 18-MONTH COMPLIANCE PERIOD AVAILABLE TO BROADBAND ACCESS SERVICES.

In addition to asking the Commission to reconsider the timing of the 18-month compliance clock, USTelecom requested that the Commission clarify which broadband access services qualify as "newly covered services" under the CALEA Applicability Order. At a minimum, the Commission should confirm that all DSL services are entitled to the same 18-month compliance time period as "newly covered" services under the CALEA Applicability Order. Such a ruling would be consistent with the broad language of the CALEA Capability Order and the Commission's stated policy objectives,³⁴ and no one commenting on the USTelecom Petition objected to this request for clarification. DOJ itself supports this

³⁴ USTelecom Petition at 3-4.

clarification, stating that it is “appropriate.”³⁵ DOJ also states that it “has no objection to allowing all forms of DSL services, including those offered on a common carrier basis, the same 18-month compliance period as other broadband Internet access services.”³⁶ In light of DOJ’s support, the Commission should confirm that all DSL services have the same 18 months to comply with CALEA as “newly covered” services.

CONCLUSION

For all of the reasons above, USTelecom urges the Commission to grant the USTelecom petition, thereby (1) requiring compliance 18 months from the effective date of the Commission’s forthcoming order on CALEA capability requirements and (2) clarifying which broadband services qualify as “newly covered” services and that all DSL services have the same 18 months to comply with CALEA as “newly covered” services.

Respectfully submitted,

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³⁵ DOJ Opposition at 10.

³⁶ *Id.* 10-11.